IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 75

UNITED STATES, *Petitioner*,

v.

ALGERNON BLAIR, individually, and to the Use of

ROANOKE MARBLE & GRANITE COMPANY, INC.,

On Writ of Certiorari to the Court of Claims

PETITION OF RESPONDENT FOR REHEARING.

H. CECIL KILPATRICK,
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PETITION OF RESPONDENT FOR REHEARING.

Comes now the above named respondent, Algernon Blair, and presents this, his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

1. It is apparent that respondent's counsel, despite their attempt to do so, have failed in their effort to get the facts of the case clearly before the Court. For this failure counsel blame only themselves, and ask for an opportunity to show that the decision here is in several respects in conflict with the actual facts and fails to take into consideration some very controlling facts.

The Court of Claims found certain facts to be true and on its finding awarded judgment. If this Court correctly understood the facts, we cannot believe it would have reached its present decision.

2. The effect of the opinion in its interpretation of government construction contracts is to drastically change certain long established and well understood rules of applicable law and fair dealing.

3. In several respects, the Court has misapplied its announced legal principles to the facts of this case.

I.

The Court Misconceives the Nature of Respondent's Claim, and the Basis of the Trial Court's Decision, with Reference to the Damages Resulting from the Failure of the Mechanical Contractor.

In the opening paragraph of the opinion, this Court states that respondent's claim is for "expenses • • • *caused by the delay of a mechanical contractor* and for other expenses alleged to have been imposed on him by the • • • unfair conduct of Government agents", and on page 3 of the opinion it is said: "Nowhere is there spelled out any duty on the Government to take affirmative steps to prevent *a contractor* from unreasonably delaying or interfering with the attempt of *another contractor* to finish ahead of his schedule." (Emphasis supplied.)

Here, at the very outset of the opinion, it is apparent that respondent has failed to make his position clear to the Court. The foundation of this claim is not simply that *Redmon* delayed, or that the Government failed to control *Redmon's* activities. The claim rests on the broader ground of the *Government's* duty to proceed, through Redmon or any other means it chose, to instal the mechanical work in the usual and customary manner so that respondent could proceed with the orderly performance of his own work.

When respondent was given the job of the general construction of the buildings, and there was excepted from his task that of installing the heating, plumbing and electrical

work, the Government became responsible for the performance of the work thus excepted. This responsibility follows because Blair, obligated as general contractor to erect and complete the buildings, could not possibly complete his work until the mechanical work was done. Neither could he progress with his work unless those charged with the duty of installing the mechanical equipment worked in coordination with him. Therefore, when the mechanical work lagged and fell behind, it was not merely that Redmon was in default in his obligation to the Government, but the Government was in default in its obligation to the general contractor.

It is obvious that a concrete floor underneath which pipes are to be placed cannot be laid until the pipe work is done, and that was true on this job (RI, 42). This was true not only as to pipe and pipe excavation under the buildings, but also as to outside pipes and pipes inside interior walls (RI, 41), and where the paving had to be done in small sections (RI, 43) at increased expense.

Therefore, when those things which had to be done before the general contractor could perform his work, and during the progress of his work, were delayed and in default, the Government was in default in its obligation to the general contractor.

Not only did this default occur, but it was caused in a large part by the contracting officer failing to take action, and this was the direct result of false statements and progress reports made by the Government's authorized agent in charge of the work at the site, of which respondent had no knowledge. This the court below specifically found to be a fact (RI, 36). These delays cost Blair money, regardless of the fact that he did by supreme effort complete within the time limit, as demonstrated in more detail below.

The claim here, therefore, is not, as stated by the Court, merely for expenses caused by "delay of a mechanical con-

tractor", but for delay in the mechanical work which had to be done before Blair could perform and for which the Government, by making its own arrangements for work outside of Blair's contract, made itself responsible.

The opinion then in the fourth paragraph states:

> "The court below found that respondent was unreasonably delayed for a period of three and a half months due to the failure of the United States to terminate Redmon's right to proceed * * *."

Here again is a complete misconception of the nature of the claim and of the judgment below. It was not simply the Government's failure to *terminate* Redmon's contract that was damaging Blair. *Performance* of the mechanical work, either by Redmon or somebody else, was what was needed. That was the thing for which the Government was responsible as a result of reserving to itself that part of the work. Termination on the first day that Redmon failed to begin his job would not have done Blair any good, unless it had been promptly followed by other arrangements for the mechanical work to be promptly started and properly prosecuted.

The Court of Claims based its decision squarely on this ground when it said (RI, 83):

> "* * * The proof shows that the contracting officer delayed unreasonably, either in compelling the mechanical contractor to proceed with his contract with the defendant so as not unreasonably to delay plaintiff or in sooner terminating the contract of the mechanical contractor for failure properly to proceed, and to relet the same so that the plaintiff would not be delayed in the performance of his work. Plaintiff had no control over the mechanical contractor or of the mechanical work which the defendant required to be done and there was a clear duty resting upon the defendant to take such action with reference to the mechanical work as might be necessary to avoid any unreasonable delay

in the prosecution and completion of the work called for by plaintiff's contract. The failure and refusal of the mechanical contractor to commence and properly to prosecute the work called for by his contract with the defendant are not chargeable to plaintiff. All that plaintiff could do, or was required to do, was to inform the contracting officer that his work was ready for the mechanical work and to protest the delay and call the same to the attention of the contracting officer, which the plaintiff did on numerous occasions in proper time and in such a way as to enable the defendant to take proper action to have the mechanical work performed and prevent the delay.".

We submit, therefore, that this Court's opinion fails to meet the question presented when it is based upon the narrow proposition that the Government is under no obligation to prevent one contractor from delaying another contractor. There can be no question that, when the Government chose to perform its duty with respect to the installation of the mechanical work through a subcontractor, instead of through its own employees, the acts and failures of that subcontractor were the acts and failures of the Government itself, insofar as respondent was concerned. *Miller* v. *United States*, 49 C. Cls. 276, 282-3; *Michigan Avenue M. E. Church* v. *Hearson*, 41 Ill. App. 89.

This erroneous statement of the basis of respondent's claim and of the judgment below is of vital importance if, as we hereinafter[1] shall demonstrate, the Government was under the obligation, implied in all construction contracts, to refrain from interference with the reasonable and orderly progress of respondent's work.

[1]See pp. 8-10, *infra*.

II.

The Court Overlooks, and Fails to Give Effect to, Certain Findings Concerning Direct Interference with Respondent by the Government's Employees, as Distinguished From the Defaults of Redmon.

The Court incorrectly assumes that all of respondent's damages resulted either from delay in the mechanical work or from improper rulings on disputes from which an appeal should have been taken.

Here again the facts apparently have not been made clear to the Court. Included in items 2 to 6 of the judgment below were several items of damages from interference by the Government's agents which are not included in the damages for mechanical work delays, and which did not involve rulings on disputes from which an appeal could have been taken, as follows:

> (a) "* * * defendant's officers in charge of the work at the site thereof * * * constantly and without plaintiff's knowledge made false, misleading and unfair reports to their superiors concerning plaintiff and his work" RI, 48-49).
>
> (b) "On occasions defendant's agents would capriciously and without reason reverse their instructions and directions after plaintiff had proceeded to comply with the first instructions" (RI, 49).
>
> (c) "In the course of their work defendant's agents in immediate charge of the work unreasonably and unnecessarily engaged in harsh, profane, and abusive language to plaintiff's officers and employees thereby unreasonably interfering with and disorganizing the work" (RI, 49).
>
> (d) "Instead of having an inspector constantly available to inspect plaintiff's work as it progressed and although requiring that each step in the work be inspected before the next step was taken by plaintiff, the defendant's agents in immediate charge of the work

required of plaintiff that he give them at least two hours written notice before they or either of them would make inspections. This had the effect of unnecessarily delaying the progress of the work and rendered it more expensive than it would otherwise have been. Defendant had only one inspector on the entire construction portion of the work and he spent most of his time in defendant's field office" (RI, 50).

(e) "During the progress of plaintiff's contract work defendant's supervising superintendent and his assistant as superintendent and inspector arbitrarily, capriciously, unreasonably and grossly erroneously interfered with and delayed the men engaged on reinforcing steel work and caused an unreasonable amount of idle time of steel crews on the job. The actual excess cost and damage to plaintiff by reason of this unnecessary, unreasonable, arbitrary and unauthorized conduct was $4,291.93" (RI, 62).

(f) "The Court also found that the Government's superintendent and inspector repeatedly ordered the re-employment of men dismissed by respondent for incompetence, and without justification dismissed competent employees in respondent's organization." (RI, 72)

The trial court did not make separate findings in each of these instances as to the resulting damage to respondent, because it was not necessary under that court's view of the law. However, it is clear from the findings that these matters were considered in fixing the amount of the total recovery, in addition to the amount awarded as a result of the delays incident to the installation of the mechanical work. This Court's opinion disregards these findings. We submit that this Court's disposition of the points relating (a) to delays in the mechanical work and (b) to matters of dispute subject to appeal to the head of the department, does not touch on the foregoing items of damage, and that, if this Court adheres to its views as set out in the opinion rendered April 10, 1944, the case should nevertheless be

remanded to the Court of Claims for a determination of the damages resulting to respondent from these direct interferences.

III.

This Court Erred in Holding That, Because the Contract Did Not Explicitly Require the Government to Refrain From Unreasonably Delaying and Interfering with Respondent's Work, it Had No Such Obligation.

We respectfully submit that the Court's opinion does not correctly describe the controversy or the trial court's decision in saying that (Opinion, p. 2) "nothing in the Government construction contract used in this case imposed an obligation or duty on the Government to aid respondent in completing his contract prior to the stipulated completion date * * *." It is equally inaccurate to say (Opinion, p. 3) that the Court of Claims held that respondent could "exact damages from the Government for failing to cooperate fully in changing the contract by shortening the time provisions * * *."

Plaintiff's case under Item 1 of the judgment rests, not upon any express provision of the contract, but upon the heretofore universally recognized rule that each party to such a contract impliedly agrees not to interfere with the orderly performance by the other.

It is elementary that parties who contract on a subject matter concerning which known usages prevail, by implication incorporate such usages into their agreements, if nothing is said to the contrary. If such customs and usages are not to be so annexed to the language and terms of the contract, they must be excluded by particular and express language[2]. In construing such contracts as this, courts

[2] *Robinson* v. *United States*, 13 Wall. 363, 366; *Bliven* v. *New England Screw Co.*, 23 How. 420; *Hostetter* v. *Park*, 137 U. S. 30; *Restatement of the Law of Contracts*, section 246 (b).

must take them as business men generally take them, as entered into upon the commonly accepted understanding of those who do this kind of business, unless the contrary is clearly made to appear[3]. The controlling question, therefore, is not whether the written contract expressly embodied or "spelled out" this duty on the part of the Government, but whether the custom and usage in the building construction industry required the Government to see to the installation of the mechanical work in the buildings in coordination with the orderly progress of respondent's work, even where respondent reasonably planned to complete in less than the maximum contract time. This is a question of fact[4]. The undisputed findings of the Court of Claims, which the opinion of this Court disregards establish beyond question:

1. That it is the "usual and recognized practice that the mechanical contractor must orderly and diligently so prosecute his work as to properly place and install all necessary mechanical equipment and materials as called for in the work of the general contractor so as not unreasonably to delay the progress of the work of the general contractor. This the Redmon Heating Co., as the mechanical contractor, at all times prior to the date on which its contract was terminated failed to do" (RI, 36-37).

2. That respondent's plan to complete in less than the time allowed him under the contract was "in accordance with the usual practice in such cases" (RI, 37); and that his plan to finish by November 1, 1934, was reasonable (RI, 38).

3. That it was the desire and intention of *both* parties to the contract that the work be completed as soon as possible after notice to proceed had been given (RI, 37).

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[3] *James & Co.* v. *Galveston County* (CCA 5), 74 F. (2d) 313, 316.

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[4] *Lamborn* v. *Blattner*, 6 F. (2d) 438.

This Court's decision that no duty rested upon the Government to refrain from interference with respondent's plan to complete in less than the maximum contract time, therefore, is in flat conflict with these findings of fact, which have not been attacked here, and is also in flat conflict with the following established principles of law:

1. That such customs and usages are by implication incorporated in the contract, unless expressly excluded.

2. That a Government contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals[5].

3. That unchallenged findings of fact by the Court of Claims are conclusive on review by the Supreme Court[6].

We therefore respectfully urge the Court to reconsider its opinion dealing with the subject of damages for delays and interference with respondent's work, and to affirm that part of the judgment below.

IV.

In Some Respects, the Court Has Erroneously Applied its Announced Principles of Law to the Facts Concerning Delays.

The Court has overlooked the fact that the contract required the completion of substantial parts of the work in *less* than 420 days, and has therefore erred in its conclusion (Opinion, p. 2) that "respondent was able to finish his construction work within the *required* 420 days" (emphasis supplied).

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[5] *United States* v. *Smoot*, 15 Wall. 47; *United States* v. *Smith*, 94 U. S. 214; *Hollerbach* v. *United States*, 233 U. S. 165, 171-2; *Reading Steel Casting Company* v. *United States*, 268 U. S. 186.

[6] 53 Stat. 752, 28 U. S. C. sec. 288; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 537-8.

While the contract did provide that *all* of the work should be completed within 420 days from the date of the notice to proceed, it further provided (RI, 32):

> "Administration and storehouse buildings will be completed 30 and 60 days, respectively, prior thereto and Radial Brick Chimney and sufficient work in Boiler House Building to permit installation of boilers and equipment will be completed 90 days prior thereto."

Since the notice to proceed was received December 21, 1933 (RI, 34), the completion dates of these particular buildings were thereby fixed as follows:

Administration Building,	Jan. 15, 1935.
Storehouse Building,	Dec. 16, 1934.
Chimney and Boiler House Building,	Nov. 16, 1934.

None of these buildings was completed within the time so stipulated, and since the Court of Claims has found that all of them would have been completed November 1, 1934, if the Government had not interfered with and delayed respondent, it seems clear, even under the principles enunciated by this Court, that respondent is entitled to the damages resulting from delays beyond the "required" dates of completion above set out. Under the theory adopted by the Court of Claims, it was unnecessary for that Court to make separate findings as to the damages resulting from these particular items of delay, but there can be no question that such damages are included in the item of $51,249.52. We therefore submit that the case should be remanded to the Court of Claims for such a determination.

V.

The Court Has Failed to Accept the Trial Court's Unchallenged Finding as to the Futility of Appeal, and Has Erred in its Application of Article 15 of the Contract.

The chief difference between the majority opinion and the dissenting opinion relates to the effect of the trial court's findings (RI, 49-50) that the Government's representatives made it impossible for respondent to avail himself of the administrative remedy of appeal. Since the Government has not challenged these findings by any assignment of error, this Court's power of review, as pointed out by Mr. Justice Frankfurter, does not permit them to be questioned. The Court of Claims examined the voluminous evidence in this case. It said that "In this case the acts and conduct of defendant's officers at the site of the work and the effect thereof were of such nature that it was *impossible* for plaintiff to protest in writing each time in the usual way through the officer at site of the work, to get a written ruling from the contracting officer at Washington and then *to appeal* in writing" (RI, 89) (emphasis supplied).

The majority opinion is therefore clearly in error in stating: "There was no finding or evidence that appeal to the head of the appropriate department or to his authorized representative would have been futile or prejudicial", when the unchallenged findings show that such appeals were rendered "impossible" by the acts and false reports of these Government agents (RI, 49-50, 71). This finding is amply supported by the evidence, and it is not reasonable to believe that, if an appeal was possible, a man with thirty-five years of successful experience in Government construction would have failed to appeal.

Furthermore, even if the Court were correct in its denial of the existence of such findings, we submit that the Court has seriously erred in holding (Opinion, p. 4) that *all* of the items on which the recovery of $79,661.56 was based were

the subject of "disputes concerning questions arising under this contract", within the meaning of Article 15 of the contract. The Court assumes, without a discussion of the facts, that an appeal to the head of the department would or could have repaired the damage done to respondent. However, an examination of the trial court's findings numbered 15, 16 and 20 make it apparent that there were numerous instances of arbitrary and outrageous conduct on the part of the Government's representatives which *at once* caused irreparable losses to respondent, and that appeals in such cases could not have given respondent relief. For example:

(a) Finding 15 (RI, 44-48) sets forth the facts on which $25,886.84 of this total was allowed, as a result of the forced construction of scaffolds, extra labor cost and unreasonable inspection. Article 15 of the contract specifically required that, pending final decision of disputes, "the contractor shall diligently proceed with the work as directed". The Government's superintendent rejected all brickwork not meeting the proper requirements as to uniformity (RI, 47). Article 6(a) of the contract made it respondent's duty thereupon to "promptly" segregate and remove the rejected material. An appeal to the head of the department, followed by a reversal of the local rejection, therefore, would have come long after the expense for unnecessary labor and material resulting from such rejection had been incurred and paid and the respondent's loss established beyond recall[7].

[7]Furthermore, the Court of Claims found that these rejections were made in bad faith, for the purpose of forcing respondent to do what the Government's superintendent conceded he had no right to require. It is too great a strain upon the intelligence to assume that the man who made that ruling would ever concede the true basis for the rejection, and it is utterly unrealistic to assume that the head of the department would himself overrule a local inspector's action in rejecting workmanship as defective, at a time when it was impossible

(b) Also included in the $79,661.56 was an item of $4,952.95, for the expense of detailing two employees to handle protests and hold conferences with the Government's officers (RI, 48-50). The Court of Claims sets forth graphically the unfair and arbitrary attitude and conduct of the Government's representatives at the site, their acts of coercion, their capricious reversal of instructions after respondent had expended time and money in reliance thereon, their use of harsh, profane and abusive language to respondent's officers and employees, their unreasonable interference with and disorganization of respondent's work. The trial court found as a fact that this course of conduct made it *necessary* for respondent to employ and use these two men in this capacity (RI, 49). The damage done by such conduct could not be repaired by an appeal. Here was no "dispute" requiring a "decision", but a situation where respondent was caused substantial losses through acts of unwarrantable superintendence. Cf. *United States* v. *Barlow*, 184 U. S. 123. The only possible avenue open to respondent was to request a removal of the troublemaker, and that request was made and was refused (RI, 82).

(c) The "slow-down" policy of inspection (discussed at pp. 6-7, *supra*) involved no dispute, but a deliberate policy and attitude resulting in extra labor costs which would not have been helped by an appeal.

(d) The direct interference with reinforcing steel workers (see p. 7, *supra*) resulted in immediate monetary damage and involved no "dispute" at all.

In brief, the Court, in its application of the provisions of Article 15, has erroneously assumed that all of the breaches of contract on which $79,661.56 of the judgment was based involved "disputes" within the meaning of that clause.

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for the head, or any other representative selected by him, to make a personal inspection, because of the intervening removal of the work.

The contract was drafted entirely by the Government, and if there be any doubt about the meaning of the term "disputes", that doubt should be resolved in respondent's favor[8]. A "dispute" is a verbal controversy or controversial discussion, involving opposing claims. There must be a matter asserted on one side and denied on the other[9]. As used in this contract, it should be limited to those situations where there was a real disagreement between the parties as to what was required by the contract.

An examination of those items of the claim above enumerated should demonstrate at once that they involved no such "dispute", but clear breaches of its contractual obligations by the Government.

We respectfully urge the Court to reconsider its decision on this phase of the case, in the light of the principles above discussed, and to affirm the judgment of the Court of Claims or at least allow a reargument which will give counsel an opportunity to discuss the detailed facts in the light of such principles.

CONCLUSION.

In this petition, we have attempted to point out what seem to us to be errors in the Court's conclusions, as to the facts and the law, and the resulting injustice to respondent. We hope that an examination of these points will convince the Court of the desirability of a reconsideration of the case.

The fact remains that respondent did suffer $130 911.08 in damages, a fact found by the court below and not questioned here. The fact also remains that in suffering the loss respondent was free from any blame. His damages were unquestionably caused by the acts of the Government's authorized representatives.

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[8] *Garrison* v. *United States*, 7 Wall. 688, 690.

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[9] *Keith* v. *Levi*, 2 Fed. 743, 745; *The Baker*, 157 Fed. 485, 487.

If the decision of this Court stands unchanged, an innocent person, damaged by his Government, will be left without a remedy for the wrongs he has innocently suffered. This is indeed deplorable, especially in view of his thirty-five years of faithful service.

Not only will respondent suffer substantially, but the Government will suffer immeasurably more in increased construction costs if the law of government contracts as announced here is to stand. In figuring their bids, contractors will naturally include something to cover the risks left open against them by this opinion. Thus, here the result will be, as it so often is in human relationships, that one who does a wrong ultimately suffers greatly more than the one who is wronged.

Here the mechanical work over which the Government had control, but over which respondent had no control and upon which he was totally dependent for his own performance, was unjustifiably delayed for many months, resulting in large damages for which respondent is left to suffer without recourse.

Here a citizen, who in good faith undertook to perform a contract with his Government, has been deliberately and purposely damaged in a very substantial amount by the representatives of the Government, who not only damaged him financially, but who deprived him of the right, as we see it and as the Court of Claims as a fact-finding body saw it, of appeal.

Surely the case cannot be left in this sort of shape. Surely there must be something amiss in a conclusion which would leave wrongs of this kind without a remedy.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Court of Claims be, upon further consideration, affirmed.

Respectfully submitted,

H. CECIL KILPATRICK,
FRED S. BALL, JR.,
Attorneys for Respondent.

Certificate of Counsel.

I, H. Cecil Kilpatrick, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

.....

H. CECIL KILPATRICK,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 75.—October Term, 1943.

The United States, Petitioner, vs. Algernon Blair, individually, and to the use of Roanoke Marble & Granite Company, Inc.	On Writ of Certiorari to the Court of Claims.

[April 10, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

Respondent, a general contractor of long experience in constructing federal buildings, was awarded a contract by the United States to construct certain buildings at the Veterans' Administration Facility at Roanoke, Virginia. After completing the contract, respondent filed a claim with the Veterans' Administration for certain expenses which he claimed were caused by the delay of a mechanical contractor and for other expenses alleged to have been imposed on him by the arbitrary, capricious and unfair conduct of Government agents at the work site. The claim was rejected and this suit in the Court of Claims followed. Judgment in the sum of $130,911.08 was awarded by that court to respondent, 99 Ct. Cls. 71. We granted certiorari because of important questions of interpretation of the Government construction contract used in this case.[1]

I.

Respondent's contract provided that the construction work was to be completed within 420 days from the receipt of notice to proceed. Concurrently, one R. J. Redmon was awarded a mechanical contract[2] by the United States to perform the plumbing, heating and electrical work in the buildings to be constructed by respondent. Redmon's work was to be commenced promptly after receipt of notice to proceed and was to be completed at a date not later than that provided in respondent's contract.

[1] The form of Government contract here involved was "U. S. Government Form P. W. A. 51," the critical provisions of which are substantially the same as those in the standard form of Government construction contract.

[2] The terms and conditions of both respondent's and Redmon's contracts were identical, differing only in the description of the work to be performed.

Respondent proceeded promptly with the construction work. He planned to complete the work within 314 days instead of the 420 days allowed him by the contract. However, no representative of Redmon reported at the work site until nearly three months after he received notice to proceed. The contracting officer had previously made many urgent demands that Redmon proceed with his work and had advised him that the progress of respondent's construction work was being delayed by his failure to start work; Redmon had also been threatened with termination of his contract. He finally started work, but made slow progress. At no time did Redmon have adequate equipment or a sufficient number of men on the job properly to carry on the work called for by his contract, nor was he financially able at this time to complete his work. The Court of Claims found that reasonable inquiry by the Government would have disclosed these facts but that no such inquiry was made because of false statements and reports made to the contracting officer by the Government agents in charge of the work at the site.

Several months later, Redmon advised the contracting officer that he was unable to proceed with his contract. Redmon's surety secured a substitute and every effort was made to overcome the delay. As a result, respondent was able to finish his construction work within the required 420 days but not within the 314 days as he had planned. The court below found that respondent was unreasonably delayed for a period of three and one-half months due to the failure of the United States promptly to terminate Redmon's right to proceed, that the cost of the delay to respondent was $51,249.52, and that the United States was liable therefor.

We are of the opinion, however, that nothing in the Government construction contract used in this case imposed an obligation or duty on the Government to aid respondent in completing his contract prior to the stipulated completion date and that it was error for the Court of Claims to award damages to respondent based upon a breach of this non-existent obligation.

If the parties did intend to impose such an obligation or duty on the Government, they failed to embody that intention expressly in the contract. Article 13 of the contract merely obligates the contractor to cooperate with other Government contractors and to refrain from committing or permitting any act which would delay such other contractors. Article 9 imposes liquidated damages upon the contractor for delay in completing his work unless due to such unforeseeable causes as "acts of the Government." No-

where is there spelled out any duty on the Government to take affirmative steps to prevent a contractor from unreasonably delaying or interfering with the attempt of another contractor to finish ahead of his schedule.

Nor is there anything in the context of the contract to lead us to believe that the parties meant more than they said, or that the contract implies something that was not expressed. The Government and respondent covenanted that the construction work would be completed within 420 days; Redmon's contract was grounded on this same time estimate. They cannot be said to have executed these contracts in contemplation of the then unrevealed intention of respondent to complete his work three and one-half months early. The fact that respondent subsequently gave notice of this intention to all the other parties concerned could not give rise to a new obligation on the Government to compel accelerated performance from Redmon.

Respondent had the undoubted right to finish his construction work in less time than the stipulated 420 days, but he could not be forced to do so under the terms of the contract. To hold that he can exact damages from the Government for failing to cooperate fully in changing the contract by shortening the time provisions would be to imply a grossly unequal obligation. We cannot sanction such liability without more explicit language in the contract. Compare *Crook Co.* v. *United States*, 270 U. S. 4; *United States* v. *Rice*, 317 U. S. 61.

II.

The Court of Claims, in addition to awarding damages for the Government's delay in terminating Redmon's contract, awarded respondent $79,661.56 damages for extra labor and materials, excess wages and miscellaneous costs found to be the result of unauthorized acts, rulings and instructions of the Government superintendent and his assistant. The court also found that these acts, rulings and instructions were unreasonable and in many instances arbitrary, capricious and so grossly erroneous as to imply bad faith.

Assuming without deciding that the actions complained of were unauthorized, unreasonable and arbitrary, we cannot conclude that recovery of the resulting damages was proper in this case. Article 15 of the contract in suit provides that all disputes "concerning questions arising under this contract shall be decided by the con-

tracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions." All of the items on which the recovery of $79,661.56 was based were the subject of "disputes concerning questions arising under this contract." Respondent appealed some of the decisions or instructions of the Government superintendent to the contracting officer, which resulted in at least one ruling favorable to respondent.[3] As to the adverse rulings, however, respondent made no further appeal to the head of the appropriate department or his authorized representative. Moreover, the remaining items which were the subject of sharp dispute between respondent and the superintendent were not even appealed by respondent to the contracting officer. And where the contracting officer could be said to have acquiesced in the superintendent's rulings, no attempt was made to appeal further to the departmental head.

Respondent has thus chosen not to follow "the only avenue for relief," *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61, available for the settlement of disputes concerning questions arising under this contract. In Article 15 the parties clearly set forth an administrative procedure for respondent to follow. Such a procedure provided a complete and reasonable means of correcting the abuses alleged to exist in this case. Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactorily by their superiors. Furthermore, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims.

The Court of Claims sought to justify respondent's failure to pursue the procedure outlined in Article 15. It found that the superintendent and his assistant acted so unreasonably as to make it impossible for respondent to invoke the appeal procedure without subjecting himself to punishment and reprisals. It also found

[3] See Part III, *infra*.

that respondent reasonably concluded that "the best and most practical way of handling the matter of protests" was informally through conferences with the contracting officer in Washington; the latter, however, was often unable or unwilling to help him. Thus the court ruled that respondent was excused from following the procedure set forth in the contract. We cannot agree. Even if the conduct of the Government superintendent or contracting officer, or their assistants, was so flagrantly unreasonable or so grossly erroneous as to imply bad faith, the appeal provisions of the contract must be exhausted before relief is sought in the courts. There was no finding or evidence that appeal to the head of the appropriate department or to his authorized representative would have been futile or prejudicial. Compare *United States* v. *Smith*, 256 U. S. 11, 16; *Ripley* v. *United States*, 223 U. S. 695, 702. We cannot on this record attribute to the departmental head the alleged unreasonable attitude of his subordinates. Nor can we assume that the departmental head would have adopted an arbitrary attitude or refused to grant respondent the relief to which he may have been entitled. Moreover, nothing in the record suggests that he could not effectively supervise his subordinates or provide full and prompt relief. Thus, absent a valid excuse for not appealing the disputed items to the departmental head pursuant to Article 15, respondent cannot assert a claim for damages in the Court of Claims. If it were shown that the appeal procedure provided in the contract was in fact inadequate for the correction of the alleged unreasonable attitude of the subordinate Government officials, we would have quite a different case. But here we must insist, not that respondent turn square corners, but that he exhaust the ample remedies agreed upon.

III.

Included in the $79,661.56 award of miscellaneous damages was one item of $9,730.27 on a claim to the use of the Roanoke Marble & Granite Company, Inc., a subcontractor of respondent who furnished the materials and performed the labor necessary to install the tile, terazzo, marble and soapstone work called for in respondent's contract with the Government. This award was based upon extra labor costs incurred under conditions erroneously exacted by the Government superintendent. Respondent appealed this matter to the contracting officer, who finally rendered a decision in favor of respondent and the subcontractor. The Gov-

ernment has not reimbursed either respondent or the subcontractor for these excess labor costs; nor has respondent paid the subcontractor for such costs. The court below made no finding, and the subcontract as introduced in the record does not expressly indicate, that respondent was liable to the subcontractor for the acts of the Government upon which the claim was based.

Clearly the subcontractor could not recover this claim in a suit against the United States, for there was no express or implied contract between him and the Government. *Merritt* v. *United States*, 267 U. S. 338. But it does not follow that respondent is barred from suing for this amount. Respondent was the only person legally bound to perform his contract with the Government and he had the undoubted right to recover from the Government the contract price for the tile, terazzo, marble and soapstone work whether that work was performed personally or through another. This necessarily implies the right to recover extra costs and services wrongfully demanded of respondent under the contract, regardless of whether such costs were incurred or such services were performed personally or through a subcontractor. Respondent's contract with the Government is thus sufficient to sustain an action for extra costs wrongfully demanded under that contract. *Hunt* v. *United States*, 257 U. S. 125.

The decision of the Court of Claims is reversed as to all items except the claim of $9,730.27. We affirm the judgment as to the latter claim.

Mr. Justice FRANKFURTER, dissenting in part.

Those dealing with the Government must no doubt turn square corners. While agents for private principals may waive or modify provisions in contracts which circumstances have rendered harsh, provisions in government contracts cannot be so alleviated. But in order to enforce the terms of a government contract courts must first construe them. And there is neither law nor policy that requires that courts in construing the terms of a government contract should turn squarer corners than if the same terms were contained in a contract between private parties. "A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument." *Hollerbach* v. *United States*,

233 U. S. 165, 171-172. Like all other writings that do not have the precision of mathematical terms, government contracts have interstices that secrete relevant implications. Neither a statute which provides that contracts shall be reduced to writing, nor the parol evidence rule "precludes reliance upon a warranty implied by law." *United States* v. *Spearin*, 248 U. S. 132, 138. Unless the terms of a contract are so explicit as to preclude it, the presupposition of fair dealing surely must underlie a government as well as a private contract. *Ripley* v. *United States*, 223 U. S. 695, 701-702; *United States* v. *Smith*, 256 U. S. 11, 16.

Accordingly, provisions in a government contract defining methods for settling controversies by appeal to the contracting branch of the Government presuppose effective resort to such methods of settling questions that arise in carrying out a contract—they presuppose that administrative remedies as a condition to judicial relief are not rendered futile and nugatory. This does not of course question the good faith of the head of the Veterans' Administration. But where the man on the spot, in his daily relations with the contractor, shows the kind of arbitrary attitude found by the Court of Claims, he cannot be effectively supervised by the head of a department. In any event, the burden of incurring the subordinate's future hostility by appeals to the head of a department should not be cast on the contractor. The findings of the Court of Claims in this case can only mean that it would have been wholly futile, and worse than futile, to invoke the explicit provisions of the contract for resort to administrative relief. Therefore, as a reciprocal duty of the Government, the contract brings into operation the implied warranty that those who have in effective keeping the administrative machinery for settling controversies will not prevent its utilization for all practical purposes.

The Court of Claims awarded respondent $79,661.56 to compensate for losses and increased costs resulting from the unreasonable and improper requirements imposed upon the contractor by the Government's superintendent of construction and his assistant. The circumstances surrounding the various items which go to make up this sum differ in details, but the basis on which the Court of Claims found for the contractor is the same.

The findings of fact of the court below tell a story of arbitrary impositions. From the outset, the superintending government officers required the contractor "to do things admittedly not required of him under the contract on threat of reprisals for refusal." These were not empty threats. The evidence shows that

an unauthorized and unreasonable order to erect outside scaffolding for laying bricks was enforced by rejecting brickwork which was not precisely uniform to a maximum of one-sixteenth of an inch by measurement, and exacting of plaintiff mortar joints that did not vary more than one-eighth of an inch by measurement. That these rejections and exactions were wilful and oppressive became clear when all objections ceased as soon as the contractor decided to comply and erect the outside scaffolds. This is but one illustration of what was apparently a systematic practice of unjustified demands and vexations.

The Court of Claims found that the superintendent and his assistant "resented plaintiff's making protest to the contracting officer, thereby rendering it impossible for plaintiff effectively to protest in writing in each instance to the contracting officer through the defendant's officer at the site of the work. . . . The contracting officer in those cases involving unreasonable and arbitrary acts and instructions of the officers at the site of the work stated to plaintiff that he understood and appreciated the troubles and difficulties under which plaintiff was having to perform the work, but there was practically nothing he could do about it and that plaintiff should keep him informed but that plaintiff 'would just have to do the best he could to get along' with the officers and inspectors at the site of the work, to the end that the work be completed as soon as possible." If there is substantial evidence supporting these findings, this Court's power of review is confined to questions of law. 53 Stat. 752, 28 U. S. C. § 288.

For all but one item, there can be no doubt that the evidence is adequate and the award in accordance with law. The contractor was awarded $107.50 for the extra cost of temperature steel used by order of the superintendent of construction in slabs reinforced with two-way rods. The record makes clear that the contract specifications supported this order of the superintendent, in that no distinction was made as to whether the slabs were reinforced by one-way or two-way rods, and the fact that the contracting officer subsequently relieved the contractor of this requirement as to two-way rods does not justify the award. In view of what I deem to be legal principles governing the construction of contracts, I should therefore affirm the judgment of the Court of Claims for damages resulting from the acts of the superintending officers after deducting $107.50.

Mr. Justice ROBERTS joins in this opinion.